Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

KARL ALAN SHULTZ, Petitioner,

v.

STATE OF WASHINGTON, Respondent.

On Petition for a Writ of Certiorari to the
Washington State Supreme Court

PETITION FOR WRIT OF CERTIORARI

CLAIRMONT E. HORMEL
P. O. Box 370
Ephrata, WA 98823
Tel: (509) 754-2476
Counsel of Record
for Petitioner

JOHN D. KNODELL
Grant County Prosecutor
P. O. Box 37
Ephrata, WA 98823
Counsel of Record
for Respondent

60PP

QUESTIONS PRESENTED

1. Does the ex post facto clause of the United States Constitution, U.S. Const. art. I § 10, prohibit the retroactive application of a 1997 Amendment to a crime punished in 1987, where the 1997 Amendment would: (1) double the trial court's length of criminal jurisdiction over the defendant whose maximum sentence had been served and allow the court to modify the amount, terms and conditions of restitution, (2) effectively increase the amount of restitution payable, (3) double the time period allowed to initiate collection proceedings on restitution, and (4) make each violation for failure to meet payment obligations imposed by the trial court punishable by sixty (60) days of incarceration?

2. Does the due process clause of the Fourteenth Amendment to the United States Constitution prohibit the retroactive application of a 1997 statutory amendment to a correct judgment and sentence entered in 1987 under the facts and with the results described in Question 1 of this petition?

3. Does the double jeopardy clause of the United States Constitution, Amendment V, prohibit the retroactive application of a 1997 statutory amendment extending criminal jurisdiction over a criminal defendant sentenced in 1987 under a 1985 statute under the facts and with the results described in Question 1 of this petition?

4. Does the bill of attainder clause of the United States Constitution, art. I, § 10, prohibit the retroactive application of a 1997 statutory amendment which affects individuals previously and correctly sentenced to a maximum term certain in a 1985 sentencing statute under the facts and with the results described in Question 1 of this petition?

5. Wasn't the Supreme Court of Washington in error where that court determined the issues presented by this petition in a manner not in conformity with or consistent with federal court decisions interpreting provisions of the United States Constitution?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

KARL ALAN SHULTZ, Petitioner,

v.

STATE OF WASHINGTON, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

The petitioner, Karl Alan Shultz, respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of Washington, entered in the above-entitled proceedings on July 29, 1999. A motion for reconsideration was denied on October 14, 1999.

OPINIONS BELOW

The opinion of the Washington State Supreme Court is reported at 138 Wn.2d 638, ____ P.2d ____, (1999) and is reprinted in the appendix hereto, p. 19a-27a, infra. The October 14, 1999, order denying motion for reconsideration entered by the Washington State Supreme Court is reprinted in the appendix hereto, p. 28a, infra.

The Order Re: Application for Additional Ten Years to Execute Judgment of the Superior Court of Grant County, Washington has not been reported. It is reprinted in the appendix hereto, p. 15a-16a, infra.

JURISDICTION

The Superior Court of Grant County, Washington, Honorable Evan E. Sperline, entered Order Re: Application for Additional Ten Years to Execute Judgment on October 13, 1997 (App., infra, 15a-16a). The State of Washington through the Grant County Prosecutor filed Notice of Appeal on October 19, 1997, and on November 4, 1997, the petitioner filed Notice of Cross Appeal.

The Acting Chief Judge of Division III of the Washington State Court of Appeals requested review by the Washington State Supreme Court which was granted on March 11, 1999 (App., infra, 17a-18a).

The Washington State Supreme Court filed its opinion disfavorable to petitioner on July 29, 1999, and petitioner's motion for reconsideration

was denied by the Washington State Supreme Court on October 14, 1999 (App., infra, 19a-28a).

On December 21, 1999, Justice O'Connor ordered that the time for filing this petition for writ of certiorari be extended to and including February 11, 2000 (Application No. 99A518).

The jurisdiction of this Court to entertain the petition for certiorari is based upon 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitutional provisions involved in this petition are listed below, and the text of each is contained in the Appendix:

U.S. Const. art. 1, § 9 (App., infra, 29a).
U.S. Const. art. 1, § 10 (App., infra, 29a).
U.S. Const. amend. V (App., infra, 30a).
U.S. Const. amend. XIV, § 1 (App., infra, 30a).

The Washington State statutory provisions and amendments are listed below, and the pertinent text of each is contained in the Appendix:

RCW 6.17.020 (App., infra, 30a)
RCW 9.94A.142, as stated in 1985 (App., infra, 31a).
RCW 9.94A.142, as stated in 1994 (App., infra, 32a).
RCW 9.94A.142, as stated in 1997 (also cited as 1997 Wn. Laws, ch. 121, § 4) (App., infra, 33a).
RCW 9.94A.195 (App., infra, 36a).
RCW 9.94A.200 (App., infra, 36a).

STATEMENT OF THE CASE

Petitioner, Karl Alan Shultz, was an 18 year old single person living at his parents' home in Quincy, Grant County, Washington, on October 9, 1985, when he was charged by Information filed in the Grant County Superior Court with 16 counts of arson — three (3) counts in the first degree, twelve (12) counts in the second degree, and one (1) count of reckless burning in the second degree.

Petitioner was suffering from cocaine addiction and pyromania and both conditions were treatable. By way of plea bargain petitioner entered a plea of guilty to each of fifteen (15) counts of arson in the second degree and one (1) count of reckless burning in the second degree and was sentenced to a maximum sentence of ten (10) years for each count to run concurrently. Petitioner was also required to serve twenty-four (24) months of incarceration. Among other financial obligations, he was required to make monthly restitution payments applying toward the total restitution of $507,131.62 during the ten (10) year length of his sentence. Payments were to be made at the rate of $100.00 per month and to be

monitored by the Washington State Department of Corrections during the ten (10) year maximum period (App., infra, 1a-12a).

The sentence entered on April 7, 1987, was consistent with the 1985 version of the state sentencing statute in effect at that time — RCW 9.94A.142. The sentence conforming to then RCW 9.94A.142 was to commence on the date of Judgment and Sentence, April 7, 1987.

Petitioner was released from custody on October 7, 1987. As a result of his conviction, employment was initially difficult to obtain. On June 16, 1989, he was brought before the Grant County Superior Court regarding his court sentence required financial obligations. The Court accepted petitioner's reasons for difficulty and no penalty for violation of the conditions resulted.

Petitioner found employment, and thereafter diligently and timely made restitution payments as required. He married and the couple had two children. In every respect he carried out the terms and conditions of his sentence.

In 1994, the Washington State Legislature amended RCW 9.94A.142 which extended the ten (10) year criminal jurisdiction of the sentencing court from the former commencement date which began on the date of entry of judgment and sentence. The 1994 amendment provided that the commencement date would begin on the date of release from confinement, or the date of entry of judgment and sentence, whichever was later. Based upon the 1994 amendment, the petitioner was brought before the Grant County Superior Court concerning the extension of criminal jurisdiction of that court from April 7, 1997, to October 7, 1997, ten (10) years from the date of his release. At this hearing, the court, petitioner and petitioner's counsel were advised that the Washington State Legislature was, at that time, considering legislation to amend RCW 9.94A.142 to permit the extension of criminal jurisdiction over previously convicted persons for restitution purposes for an additional ten (10) year period following termination of the original maximum sentence period. In petitioner's situation such intended legislation would extend his maximum ten (10) year sentence period under the criminal jurisdiction of the sentencing court for a further term of ten (10) years.

The matter was set for review on September 23, 1997, which was past the maximum ten (10) year term for continuing criminal jurisdiction under the original judgment and sentence and the 1985 version of RCW 9.94A.142 under which the sentence was imposed, which sentence term would have expired on April 7, 1997.

The Washington State Legislature enacted the proposed amendment in April, 1997, and it became effective on July 27, 1997.

On September 30, 1997, the Grant County Pro ecutor's Office, on behalf of the Grant County Clerk, moved to extend the criminal jurisdiction

by the Grant County Superior Court for an additional ten (10) years to enforce the restitution provisions of the petitioner's judgment and sentence.

The petitioner contested the State's motion and filed a memorandum of legal authorities contending that the amendatory legislation extending the maximum length of petitioner's sentence violated his constitutional rights in the following respects:

1) The legislation violated the ex post facto provisions of the United States Constitution art. I, § 10; and

2) Imposition of the ten (10) year extension of the petitioner's maximum sentence through amendment of the sentencing statute deprived him of due process under the United States Constitution, Amendment XIV, § 1; and

3) The ten (10) year extension of petitioner's maximum sentence through statutory amendment of RCW 9.94A.142 served to place petitioner twice in jeopardy under the United States Constitution, Amendment V, for the offenses with which he had been charged, had entered pleas of guilty, and had been sentenced. Thus, the extension amounted to a later, second punishment for the same criminal act.

4) That the amendatory legislation and its application to petitioner constituted a bill of attainder prohibited by the United States Constitution, art. I, § 10, in that it is a legislative enactment which applies to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial.

The petitioner raised the same contentions based upon the relevant provisions of the Washington State Constitution.

On October 13, 1998, the Superior Court issued its decision in Order Re: Application for Additional Ten Years to Execute Judgment which held, in essence, that though the civil recovery provisions of the amendatory legislation was procedural, and this could be imposed, that the amendment as applied to petitioner by continuing criminal jurisdiction and penalty incarceration provisions violated the prohibition against ex post facto legislation by states, declared petitioner's sentence terminated as of October 7, 1997, and that he was no longer subject to the criminal jurisdiction of the Superior Court (App., infra, 15a).

The Superior Court based this decision in large measure upon the penal characteristics of the legislation which was enforceable by imposition of a sixty (60) day term of incarceration for each violation of the sentencing court's restitution orders. RCW 9.94A.200.

Following the decision by the Grant County Superior Court, the State initiated an appeal therefrom by filing a Notice of Appeal to the Washington State Court of Appeals, Division III, on October 29, 1997.

The petitioner filed Notice of Cross Appeal on November 4, 1997, contesting that portion of the Superior Court's order which extended civil liability collection procedures.

On March 5, 1999, the Acting Chief Judge requested certification of the questions presented by the appeal by the Washington State Supreme Court which granted review on March 11, 1999 (App., infra, 17a-18a).

On July 29, 1999, the Court filed and issued its en banc Opinion reversing the Superior Court's decision (App., infra, 19a-27a).

In determining the issues before it, the Washington State Supreme Court decided both federal and state constitutional questions based upon Washington case law citing cases of that state. Though purporting to decide the United States Constitutional issues raised in the appeal, only two federal cases were cited as authority in its opinion relative to the bills of attainder issue (App., infra, 25a).

In reversing the Grant County Superior Court, the Washington State Supreme Court held that neither the 1994 nor the 1997 amendments to RCW 9.94A.142 altered the standard of punishment (Hennings, 129 Wn.2d at 527), and that neither did the amendments have any effect on the quantum of punishment, since the original amount of restitution was not increased, but merely extended the length of the sentencing court's jurisdiction to enforce the restitution required by the petitioner's sentence. For that reason the Washington State Supreme Court held that the 1994 and 1997 sentencing amendments did not violate the ex post facto provisions of either the United States or Washington State constitutions (App., infra, 22a-23a).

Concerning the extension of the criminal jurisdiction of the sentencing court and its power to jail a defendant for each failure to comply with the restitution portion of the sentence, the Washington State Supreme Court held that the 1997 amendment merely ". . . maintains the status quo. . .," if the sentencing court ". . .chooses to extend its jurisdiction. . ." (App., infra, 23a).

Concerning the question of whether petitioner's due process rights had been violated, the Washington State Supreme Court held that at the time of his sentencing ". . .Shultz had only a mere expectation that the court's jurisdiction over his restitution order would expire on a particular date. . ." And, that petitioner ". . . fails to establish he had a vested right in the expiration date of the restitution order. . ." The Court went on to state that the language of the 1997 amendment is discretionary, and that the trial court (sentencing court) had held additional proceedings to consider the State's request for an extension of jurisdiction, and that petitioner was given notice of the request, appeared through his attorney, and filed a memorandum opposing the extension, and that had the sentencing court extended jurisdiction, such an action would have constituted ". . . an indirect and tangential consequence of Shultz' guilty plea, so as to

withstand his due process challenge to the 1997 amendment." The court thus concluded by ruling that lengthening of the court's jurisdiction over his restitution order did not interfere with a vested right, and extension of the court's jurisdiction was not a direct consequence of his plea. (App., infra, 24a-25a).

Regarding the issue of whether the amendments constituted a bill of attainder under U. S. Const. art. I, § 10 (and the state equivalent), the Washington State court held that the 1994 and 1997 amendments did not add to a defendant's punishment as originally imposed by the sentencing court, and therefore do not inflict punishment. (App., Infra, 25a).

The Washington State court disposed of the double jeopardy issue raised under the Fifth Amendment and its Washington State equivalent, by merely stating that ". . .Shultz has never suffered more than one restitution punishment for his string of arsons, and that the 1994 and 1997 amendments did not impose further punishment for those crimes." (App., Infra, 25a).

On October 14, 1999, the Washington State Supreme Court denied reconsideration. (App., Infra, 28a).

REASONS FOR GRANTING THE PETITION

The Washington State Supreme Court decided the several issues involving the United States Constitution almost solely on the basis of Washington State case law and cited no federal case law on any of the issues other than the bill of attainder question which actually cited two Washington State cases, which, in turn cited federal cases (State v. Hennings, 129 Wn.2d 512, 527, 919 P.2d 580 (1996) citing Landgraf v. USI Film Prods., 511 U.S. 244, 114 S. Ct. 1483, 1497, 128 L. Ed. 2d 229 (1994) and State v. Manussier, 129 Wn.2d 652, 666, 921 P.2d 473 (1996) citing Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 470, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977) (App., infra, 25a).

Ex Post Facto

Under Article I, § 10, of the United States Constitution, states are prohibited from passing ex post facto legislation. Collins v. Youngblood, 497 U.S. 37, 43, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990) (citing Calder v. Bull, 30 S. (3 Call.) 386, 390-92 (1798).

Petitioner was sentenced on April 7, 1987, under the then current and existing version of RCW 9.94A.142 passed by the Washington State Legislature in 1985 (App., infra, 31a-32a). He was sentenced correctly and validly by the sentencing court — the Superior court of Grant County, Washington (App., infra, 1a-14a). He was sentenced for the crimes of arson that he committed between August 24 and October 7 in 1985 while the 1985 version of RCW 9.94A.142 was in effect (App., infra, 1a-14a).

The judgment and sentence entered on April 7, 1987, provided for concurrent maximum sentences of ten (10) years from the date of the Judgment and Sentence (App., infra, 12a). This was entirely consistent with the 1985 statute, RCW 9.94A.142 (App., infra, 31a).

Petitioner's maximum sentence under the 1985 version of RCW 9.94A.142 was due to expire on April 7, 1997. Under that statute, as well as his Judgment and Sentence, he would not have been required to make any further restitution payments. Persons claiming injury by his actions had private civil remedies under Washington law which permitted extension of any civil law judgments by judgment creditors. RCW 6.17.020(3) (App., infra, 30a).

The extension of the sentencing court's criminal jurisdiction did not result from any violation of the petitioner's conditions of sentence or for failure to meet his court ordered restitution payments under his judgment and sentence. It resulted only by virtue of the later passage of the 1994 and 1997 amendments to RCW 9.94A.142 (App., infra, 32a-36a).

A recent decision of the United States Court of Appeals for the Sixth Circuit, United States v. Johnson, 181 F.3d 105 (Unpublished Opinion, April 29, 1999) is presently before the United States Supreme Court where certiorari has been granted. Johnson v. United States, ____ U.S. _____, 120 S. Ct. 370 (October 18, 1999). That case concerns the ex post facto clause prohibition found in Article 1, § 9, of the Constitution. The decision refers to the division between the decisions of the Sixth Circuit and several others, and cites cases emanating from those circuits relative to ex post facto clause decisions contrary to those of the Sixth Circuit: United States v. Lominac, 144 F.3d 308, 312-16 (4th Cir. 1998); United States v. Dozier, 119 F.3d 239, 242-44 (3d Cir. 1997); United States v. Collins, 118 F.3d 1394, 1397-99 (9th Cir. 1997), and United States v. Meeks, 25 F.3d 1117, 1119 (2d Cir. 1994).

Regardless of the division between the circuits, petitioner submits that under case law of any and all of the circuit courts, the Washington State 1994 and 1997 amendments would ". . . run afoul of the ex post facto clause . . ." since "1) the statute must apply retroactively to past conduct; and 2) the statute must work to the prejudice or disadvantage of the defendant. . ." United States v. Johnson, supra, citing Miller v. Florida, 482 U.S. 423, 430, 96 L. Ed. 2d 351, 107 S. Ct. 2446 (1987); Johnson v. United States, supra.

Petitioner submits that the 1994 and 1997 amendments violate the ex post facto clause by the effects thereof meeting the two basic criteria for violation of art. I, § 10.

Altering the Standard of Punishment

The Sentencing Reform Act (SRA) of Washington State is found in

Chapter RCW 9.94A. The SRA ties restitution to criminal proceedings. See RCW 9.94A.142 (1995); 1997 Wn. Laws, ch. 121, § 4. Failure to pay restitution is punishable by incarceration. See RCW 9.94A.195 (1984) (App., infra, 36a) and RCW 9.94A.200 (1984) (App., infra, 36a-38a). Further, civil remedies are not limited when restitution is imposed. RCW 9.94A.142; 1997 Wn. Laws, ch. 121, § 4. These characteristics of Judgment and Sentence restitution orders require the conclusion that restitution under the SRA is punishment.

And, the test for whether ex post facto punishment exists in this case supports a finding of punishment. The test requires the court to inquire first whether the legislature intended to inflict punishment. Hudson, et al v. United States, 522 U.S. 93, 139 L. Ed. 2d 450, 118 S. Ct. 488 (1997); see also Kansas v. Hendricks, 521 U.S. 456, 138 L. Ed. 2d 501, 117 S. Ct. 2072 (1997). The Washington Legislature's intent to punish is evident by making restitution part of the Sentencing Reform Act of 1981. Chapter RCW 9.94A. Further, the legislative history behind the 1997 amendment reveals that the 1997 amendment's purpose is to punish. While furnishing testimony in support of Engrossed House Bill 1096 (the 1997 amendment to RCW 9.94A.142), one Debbie Wilki, a spokesperson for the Washington Association of County Officials, after noting that the 1997 amendment was the result of "extensive collaboration with the Prosecuting Attorney's Association, Department of Corrections and court personnel," testified that the bill's primary purpose is "not to make money" but to hold criminals responsible for the punishment imposed by the Court and to reimburse victims (App., infra, 41a-43a). Further, Ms. Wilki testified that even if the program cost more than it collected, it would be successful if it held criminals responsible (App., infra, 43a).

The Washington courts consider legislative committee hearing testimony as a source to determine legislative intent. State v. Anderson, 94 Wn.2d 176, 187, 616 P.2d 612 (1980).

Further, the statutory scheme is also so punitive in purpose and effect "to create punishment." Kansas v. Hendricks, supra.

The purposes behind the prohibition of ex post facto laws support a finding of punishment. There are two essential purposes for the ex post facto clause: 1) providing fair notice of the extent of the penalty attaching to criminal conduct; and 2) prevention of arbitrary and vindictive legislation. See, e.g. Weaver v. Graham, 450 U.S. 24, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981). Retroactively increasing criminal jurisdiction to modify the amount, terms and conditions of restitution, and to enforce by further incarceration denies an offender fair notice of the extent of the penalty for committing arson and leaves governmental power unrestrained. Lynce v. Mathis, 519 U.S. 433, 137 L. Ed. 2d 63, 117 S. Ct. 891, 896 (1997) quoting Weaver v. Graham, supra.

The 1994 amendment along with the 1997 amendment had the express effect of extending the criminal sentence by an additional ten (10) years during which the petitioner was faced with the possibility or potential of imposition of incarceration for any failure to make payments. RCW 9.94A.195 and RCW 9.94A.200.

The ex post facto prohibition extends to the federal government and the states, and is construed as having similar effect:

> Article I of the United States Constitution provides that neither Congress nor any State shall pass any "ex post facto Law." See Art. I, § 9, cl. 3; Art. I, § 10, cl. 1. . . .

Miller v. Florida, supra [482 U.S. 429].

On the ex post facto question alone, this case presents a serious departure from interpretations by federal courts of Art. 1, § 10, cl. 1, of the United States Constitution. Obviously, the question created by the 1994 and/or 1997 amendments to RCW 9.94A.142 have or will affect defendants other than the petitioner. Certainty that the Washington Supreme Court, and other appellate courts of Washington State, will abide by the United States Constitutional provisions is necessary to preserve the rights of those residing in Washington State. The petitioner submits that this one question by itself is worthy of the attention of the Supreme Court which should grant the petition.

Due Process Question

The petitioner's due process rights are violated by the 1997 amendment because the amendment retroactively divests Mr. Shultz of his reasonable expectation that restitution would last for only ten (10) years, and the summary change of the court's authority to impose restitution prevents Mr. Shultz's plea from being knowing, voluntary and intelligently made.

The Constitution of the United States prohibits states from depriving individuals of life, liberty or property without due process of law. U. S. Const. Amend. XIV, § 1.

The due process guarantee under the Fourteenth Amendment requires that a plea bargain by a defendant be knowing, intelligent and voluntary. Henderson v. Morgan, 426 U.S. 637, 644-45, 49 L. Ed. 2d 108, 96 S. Ct. 2253 (1976); Boykin v. Alabama, 395 U. S. 238, 242-43, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969).

Petitioner knew that he would be required to pay restitution when he entered into his plea agreement in this case, but was informed that criminal jurisdiction over him would terminate in ten (10) years at the end of his maximum sentence. The 1997 amendment had the effect of extending criminal jurisdiction for an additional ten (10) years with the same penal provisions to enforce the extended period of criminal

jurisdiction relating to restitution. Petitioner could not possibly give a knowing, intelligent and voluntary plea if the state could summarily, through later legislation, double the duration of criminal jurisdiction to modify the amount, terms and conditions of restitution, and to enforce such modification through incarceration.

The petitioner was thereby deprived of due process under the Fourteenth Amendment and his petition should be considered and a writ of certiorari granted based upon this question.

Double Jeopardy Question

The double jeopardy clause of the United States Constitution prohibits the application of the 1997 amendment of RCW 9.94A.142 to petitioner's 1987 sentence because the amendment would increase the punishment of a sentence that was correct when entered.

The United States Constitution prohibits placing any person twice in jeopardy for the same crime. U. S. Const. amend. V.

The petitioner's sentence was correct when entered on April 7, 1987, in accordance with the 1985 version of RCW 9.94A.142. The double jeopardy clause of the United States Constitution prohibits increasing a correct sentence. United State v. DiFrancesco, 449 U.S. 117, 138-39, 66 L. Ed. 2d 328, 101 S. Ct. 426 (1980). See also Ex Parte Lange, 85 U. S. (18 Wall.) 872 (1873).

The 1997 amendment allows the court to modify not only the amount, but the terms and conditions of restitution. The 1997 amendment allows these changes to be made under the same cause number under which the original sentence was issued. The predicate facts and offense have not changed, and the 1987 judgment and sentence was correct.

Increasing the jurisdiction to modify the amount, terms and conditions of restitution under the 1997 amendment would place petitioner twice in jeopardy for his previously adjudicated offense, and the United States Supreme Court should examine this question and grant certiorari.

Bill of Attainder Question

The 1997 amendment violates prohibitions concerning bills of attainder because the amendment identified Mr. Shultz based upon a prior offense and summarily allows an increase in the authority of the court to impose restitution.

The Constitution of the United States prohibits states from passing bills of attainder. U.S. Const. art. I, § 10. A bill of attainder is a legislative act which applies to named individuals or to easily ascertained members of a group in such a way as to inflict punishment on them without judicial trial. See United States v. Brown, 381 U.S. 437, 442, 445, 14 L. Ed. 2d 484, 85 S. Ct. 1707, (1965). The prohibitions on bills of attainder prevent

legislatures from singling out disfavored persons and meting out summary punishment for past conduct. Landgraf v. USI Film Prods., supra. In order for a legislative enactment to be deemed a bill of attainder, it must (1) specify the affected persons, (2) inflict punishment, and (3) lack judicial trial. Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 847, 82 L. Ed. 2d 632, 104 S. Ct. 3348 (1984).

The 1997 amendment singles out Mr. Shultz because it applies to him based upon a previously committed offense. Here, Mr. Shultz and other individuals previously convicted of felonies are an identifiable class. The predicate offense has already been committed and thus there is no way to avoid the harsh effects of the 1997 amendment.

The 1997 amendment inflicts punishment upon Mr. Shultz. As discussed under the analysis of the ex post facto issue and the double jeopardy issue, and is incorporated in argument of this question.

Finally, the 1997 amendment does not allow for a judicial hearing regarding additional punishment. The 1997 amendment simply superimposes the additional jurisdiction upon Mr. Shultz, if an application to extend criminal jurisdiction is made. See 1997 Wn. Laws, ch. 121, § 4 (RCW 9.94A.142) (App., infra, 33a-36a).

Based upon Mr. Shultz's prior offense, the 1997 amendment summarily increased the trial court's authority to modify the amount, terms and conditions of restitution and to enforce such orders by incarceration. Such legislation constitutes a bill of attainder.

Conflicting Decision of the
Washington State Supreme Court

The federal court decisions cited in the foregoing four (4) Questions posed by this petition demonstrate the lack of conformity, inconsistency, and actual conflict between the decision of the Washington State Supreme Court in regard to those issues. The petitioner adopts and incorporates by reference, those cases cited in argument concerning each and all of the Questions in support of this final Question and argument.

CONCLUSION

For these several and various reasons, based upon the Questions presented by the petitioner, the petition for certiorari should be granted.

Respectfully submitted,

CLAIRMONT E. HORMEL
P. O. Box 370
Ephrata, WA 98823
Tel: (509) 754-2476
Counsel of Record for
Petitioner

SUPERIOR COURT OF WASHINGTON FOR GRANT COUNTY

STATE OF WASHINGTON,	)	
	)	NO. 85-1-00156-0
Plaintiff,	)	
	)	JUDGMENT AND
v.	)	SENTENCE
	)	(FELONY)
KARL ALAN SHULTZ,	)	
SID# WA 13046106	)	
LIN# QPD 85-09570	)	
	)	
Defendant.	)	

I. HEARING

1.1 A sentencing hearing in this case was held August 15, 1986.

1.2 Present at the sentencing hearing were:
Defendant: Karl Alan Shultz
Defendant's attorney: J. Luke McKean, C. E. Hormel, and Michael D. Aiken
Prosecuting Attorney: Paul Klasen Other:

1.3 That state has moved for dismissal of Count(s) N/A.

1.4 Defendant was asked if there was any legal cause why judgment should not be pronounced, and none was shown.

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report, and case record to date, the court finds:

2.1 CURRENT OFFENSES(S): The defendant was found guilty on April 21, 1986, by plea of guilty to:

COUNT 1: ARSON IN THE SECOND DEGREE, RCW 9A.48.03(1); Crime Code: 02016; Date of Crime: August 27, 1985; Incident # QPD 85-09570;

COUNT 2: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: August 28, 1985; Incident # QPD 85-09570;

COUNT 3: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: August 30, 1985; Incident # QPD 85-09570;

COUNT 4: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 3, 1985; Incident # QPD 85-09570;

COUNT 5: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 3, 1985; Incident # QPD 85-09570;

COUNT 6: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 11, 1985; Incident # QPD 85-09570;

COUNT 7: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(l); Crime Code: 02016; Date of Crime: September 12, 1985; Incident # QPD 85-09570;

COUNT 8: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 15, 1985; Incident # QPD 85-09570;

COUNT 9: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 16, 1985; Incident # QPD 85-09570;

COUNT 10: RECKLESS BURNING IN THE SECOND DEGREE, RCW 9A.48.050(1); Crime Code: 02114; Date of Crime: September 19, 1985; Incident # QPD 85-09570;

COUNT 11: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 16, 1985; Incident # QPD 85-09570;

COUNT 12: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 22, 1985; Incident # QPD 85-09570;

COUNT 13: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 22, 1985; Incident # QPD 85-09570;

COUNT 14: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 23, 1985; Incident # QPD 85-09570;

COUNT 15: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: October 2, 1985; Incident # QPD 85-09570;

COUNT 16: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: October 7, 1985; Incident # QPD 85-09570;

( ) With special verdict/finding for use of deadly weapon on Count(s) : N/A

( ) Current offenses encompassed the same criminal conduct and should be counted as one crime in determining the offender score (RCW 9.94A.400(1)): NONE

2.2 CRIMINAL HISTORY: The court finds that the defendant has the following criminal history used in calculating the offender score pursuant to RCW 9.94A.360: No prior felony convictions.

2.3 SENTENCING DATA:

COUNT 1: OFFENDER SCORE: 9+; SERIOUSNESS LEVEL: IV; RANGE: 63 - 84 months; MAXIMUM: 10 years;

COUNT 2: OFFENDER SCORE: 9+; SERIOUSNESS LEVEL: IV; RANGE: 63 - 84 months; MAXIMUM: 10 years;

COUNT 3: OFFENDER SCORE: 9+; SERIOUSNESS LEVEL: IV; RANGE: 63 - 84 months; MAXIMUM: 10 years;

COUNT 4: OFFENDER SCORE: 9+; SERIOUSNESS LEVEL: IV; RANGE: 63 - 84 months; MAXIMUM: 10 years;

COUNT 5: OFFENDER SCORE: 9+; SERIOUSNESS LEVEL: IV; RANGE: 63 - 84 months; MAXIMUM: 10 years;

COUNT 6: OFFENDER SCORE: 9+; SERIOUSNESS LEVEL: IV; RANGE: 63 - 84 months; MAXIMUM: 10 years;

COUNT 7: OFFENDER SCORE: 9+; SERIOUSNESS LEVEL: IV; RANGE: 63 - 84 months; MAXIMUM: 10 years;

COUNT 8: OFFENDER SCORE: 9+; SERIOUSNESS LEVEL: IV; RANGE: 63 - 84 months; MAXIMUM: 10 years;

COUNT 9: OFFENDER SCORE: 9+; SERIOUSNESS LEVEL: IV; RANGE: 63 - 84 months; MAXIMUM: 10 years;

COUNT 10: OFFENDER SCORE: UNRANKED

COUNT 11: OFFENDER SCORE: 9+; SERIOUSNESS LEVEL: IV; RANGE: 63 - 84 months; MAXIMUM: 10 years;

COUNT 12: OFFENDER SCORE: 9+; SERIOUSNESS LEVEL: IV; RANGE: 63 - 84 months; MAXIMUM: 10 years;

COUNT 13: OFFENDER SCORE: 9+; SERIOUSNESS LEVEL: IV; RANGE: 63 - 84 months; MAXIMUM: 10 years;

COUNT 14: OFFENDER SCORE: 9+; SERIOUSNESS LEVEL: IV; RANGE: 63 - 84 months; MAXIMUM: 10 years;

COUNT 15: OFFENDER SCORE: 9+; SERIOUSNESS LEVEL: IV; RANGE: 63 - 84 months; MAXIMUM: 10 years;

COUNT 16: OFFENDER SCORE: 9+; SERIOUSNESS LEVEL: IV; RANGE: 63 - 84 months; MAXIMUM: 10 years;

2.4 EXCEPTIONAL SENTENCE:

(X) Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s). Findings of Fact and Conclusions of Law are attached in Appendix D.

2.5 CATEGORY OF OFFENDER: The defendant is:

A. (X) An offender who shall be sentenced to confinement over one year.

B. ( ) An offender who shall be sentenced to confinement one year or less.

C. ( ) A first time offender who shall be sentenced under the waiver of the presumptive sentence range, (RCW 9.94A.030(12),.120 (5)).

2.6 RESTITUTION:

Based on information concerning restitution attached, the defendant is responsible for payment of restitution:

(X) For offenses adjudicated herein pursuant to RCW 9.94A.140 (1).

( ) For offenses which were not prosecuted and for which the defendant agreed to make restitution in a plea agreement, which is attached.

III. JUDGMENT

IT IS ADJUDGED that the defendant is guilty of the crime(s) of:

COUNT 1: ARSON IN THE. SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: August 27, 1985; Incident # QPD 85-09570;

COUNT 2: ARSON IN THE. SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: August 28, 1985; Incident # QPD 85-09570;

COUNT 3: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: August 30, 1985; Incident # QPD 85-09570;

COUNT 4: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 3, 1985; Incident # QPD 85-09570;

COUNT 5: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 3, 1985; Incident # QPD 85-09570;

COUNT 6: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 11, 1985; Incident # QPD 85-09570;

COUNT 7: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 12, 1985; Incident # QPD 85-09570;

COUNT 8: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 15, 1985; Incident # QPD 85-09570:

COUNT 9: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 16, 1985; incident # QPD 85-09570;

COUNT 10: RECKLESS BURNING IN THE SECOND DEGREE, RCW 9A.48.050 (1); Crime Code: 02114; Date of Crime: September 19, 1985; Incident # QPD 85-09570;

COUNT 11: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 16, 1985; Incident # QPD 85-09570;

COUNT 12: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 22, 1985; Incident # QPD 85-09570;

COUNT 13: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 22, 1985; Incident # QPD 85-09570;

COUNT 14: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: September 23, 1985; Incident # QPD 85-09570;

COUNT 15: ARSON IN THE' SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: October 2, 1985; Incident # QPD 85-09570;

COUNT 16: ARSON IN THE SECOND DEGREE, RCW 9A.48.030(1); Crime Code: 02016; Date of Crime: October 7, 1985; Incident # QPD 85-09570;

( ) With special verdict/finding for use of deadly weapon on Count(s) : N/A

( ) Current offenses encompassed the same criminal conduct and should be counted as one crime in determining the offender score (RCW 9.94A.400 (1)): NONE

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the conditions set forth below:

4.1 MONETARY ASSESSMENTS:

Defendant shall pay to the Clerk of this Court:

(XX) A. COSTS: Court costs, to be taxed by the Clerk of the Court.

(XX) B. VICTIM ASSESSMENT: Penalty assessment pursuant to RCW 7.68.035: $ 70.00

(X) C. RESTITUTION: Restitution payments (with credit for amounts paid by co-defendants, if any) to:

Dick Poldervart
P. O. Box 335
Quincy, WA 98848
$ 27,754.10

Mills Mutual
1025 Security Building
Seattle, WA 98101
Policy No. A-852167
$ 14,048.90

Warren Huston
Route 1, 1082 Road R NW
Quincy, WA 98848
$ 250.00

Unigard Insurance
P. O. Box 11
Wenatchee, WA 98801
Policy No. F005-8631
$ 34,748.81

Trinidad Grainery Cenex - Full Circle 201 A. Street SE Quincy, WA 98848	$ 10,000.00
Industrial Risk Insurance P. O. Box 64089 St. Paul, MN 55165-0089 Policy No. 31-327145	$ 44,500.00
Flanagan & Jones 989 Road S NW Quincy, WA 98848	$ 16,012.26
Martin-Morris P. O. Box 726 Quincy, WA 98848	$ 118,987.74
Columbia Basin Nursery Carl Perleberg 625 H Street SE Quincy, WA 98848	$ 1,100.00
Firemen's Fund Libke, Jones & Mitchell P. O. Box 360 Wenatchee, WA 98801 Policy No. FRM 4965465	$ 19,703.27
Mindi Robertson 425 J Street SW Quincy, WA 98848	$ 100.00
Travelers Policy No. 914499278-663-1	$ 32,603.65
Frances Miller 202 M Street SW Quincy, WA 98848	$ 148.00

National Farmer Union Ins. 321 S. Beech Street Moses Lake, WA 98837 Policy No. 45-03503-4101	$ 4,135.12
Cleo Thaemert 1599 Frenchman Hills Road Quincy, WA 98848	$ 1,000.00
Grain Dealers Mutual 1025 Security Bldg. Seattle, WA Policy No. A-854-046	$ 149,000.00
Ted Neilson Construction 20 N Street SW Quincy, WA 98848	$ 100.00
Western Insurance Co. Suite 215 1st West 200 1st Avenue W. C19001 Seattle, WA 98119 Policy No. DW6439772	$ 1,000.00
American States Route 2 596 Road U NW Quincy, WA 98848 Policy No. FF 042 469	$ 14,000.00
Juan Rico Route 1, Box 18J-13 San Juan, TX 78589	$ 5,451.00
TOTAL RESTITUTION	$ 507,131.62

( ) D. RECOUPMENT FOR ATTORNEY FEES $

( ) E. FINE $

( ) F. DRUG ENFORCEMENT FUND $

( ) G. OTHER

The above payments shall be made to the Grant County Superior Court Clerk, P. O. Box 37, Ephrata, WA 98823, by certified check or money order, and according to the following terms:

( ) Under the direction as provided by his Community Corrections Supervisor.

(X) At the rate of $100.00, per month commencing November l, 1987.

(XX) The defendant shall provide a copy of receipts of such payments to his Community Corrections Supervisor.

The Clerk of the Court shall credit monetary payments to the above obligations in the above listed order. The Clerk shall disburse restitution payments every six months on a pro-rata basis.

4.2 The court DISMISSES Count(s) M/A.

4.3 DETERMINATE JUDGMENT AND SENTENCE (FIRST TIME OFFENDER WAIVER OF PRESUMPTIVE SENTENCE):

The Court having found that the defendant is a first time offender under RCW 9.94A.030 (12) and RCW 9.94A.120 (5), the court waives the imposition of a sentence within the presumptive sentence range, and further the court having determined that no legal cause exists to show why a further judgment should not be pronounced, it is therefore ORDERED, ADJUDGED and DECREED the defendant serve the determinate sentence and abide by the conditions set forth below:

(X) A. CONFINEMENT: The defendant is sentenced to a term of total confinement in the Grant County Jail for 12 months each on Counts 1 through 9, and 11 through 16, to run concurrently, and 12 months on Count 10 to run consecutively; with credit for time served, to commence August 15, 1986. Defendant has served 310 days in confinement before sentencing, as of August 15, 1986, and the confinement was solely in regard to the offense(s) for which the offender is being sentenced. Defendant shall not be credited with any good time. His release date is scheduled at October 7, 1987.

( ) B.ALTERNATIVE CONVERSION:

( ) a. _____ days/months of total confinement are hereby converted to days/months of partial confinement to be served subject to the rules and regulations of the Grant County Jail.

( ) b. _____ days of total confinement are hereby converted to _____ hours of community service to be completed as follows:

(X) c. The defendant is eligible for an alternative sentence to total confinement pursuant to RCW 9.94A.380, but alternatives were not utilized because: This is a sentence below the guidelines.

4.4 (X) COMMUNITY SUPERVISION:

Defendant shall serve 24 months of community supervision to commence immediately upon release from jail . The defendant shall report immediately upon release from jail to the Community Corrections Office, 229 First Avenue Northwest, Ephrata, Washington, 98823. The defendant shall comply with all rules, regulations and requirements of the Community Corrections Officer.

4.5 (X) OTHER CONDITIONS:

(X) a. The offender is restrained from committing new offenses.

(X) b. The defendant shall totally abstain from the use of alcohol during the term of his community supervision.

(X) c. The defendant shall totally abstain from the use of drugs, except those prescribed by a physician.

(X) d. The defendant shall follow such course of treatment for pyromania as directed by his community corrections officer.

The court shall retain jurisdiction over the defendant for a period of ten years.

Violations of the conditions or requirements of this sentence are punishable by up to 60 days of confinement for each violation (RCW 9.94A.200 (2)).

IT IS FURTHER ORDERED that the representation of the defendant by his court appointed counsel is terminated 30 days from the date hereof.

SIGNED IN CHAMBERS this 7th day of April, 1987.

EVAN E. SPERLINE – JUDGE

Presented by: Paul Klasen, Prosecuting Attorney

Approved as to form and notice of presentment waived
DATED: April 1, 1987

C. E. Hormel, Attorney for Defendant

Karl Alan Shultz
DATED: April 1, 1987

FINGERPRINTS

LEFT FOUR FINGERS Taken Simultaneously:

RIGHT FOUR FINGERS Taken Simultaneously:

Fingerprints of: KARL ALAN SHULTZ
Attested to this 7th day of April, 1987.
DEDRA J. OSBORN, Clerk

By: Dorothy J. McKay, Deputy Clerk

OFFENDER IDENTIFICATION

State I.D. Number: WA 13046106
Date of Birth: 06-08-66
Sex: Male
Race: White

SUPERIOR COURT OF WASHINGTON FOR GRANT COUNTY

STATE OF WASHINGTON,	)	
	)	NO. 85-1-00156-0
Plaintiff,	)	
	)	JUDGMENT AND
v.	)	SENTENCE (FELONY) –
	)	APPENDIX D. FINDINGS OF
	)	FACT AND CONCLUSIONS
KARL ALAN SHULTZ,	)	OF LAW FOR EXCEPTION
	)	SENTENCE
Defendant.	)	

2.4 An exceptional sentence below the standard range should be imposed based upon the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1.1 That this Court, pursuant to RCW 9.94A.120 (2) has the authority to impose a sentence outside of the standard range for these offenses.

1.2 That in considering the purposes of the Sentencing Reform Act, there are substantial and compelling reasons justifying an exceptional sentence herein.

1.3 The defendant was motivated by Pyromania and acted under compulsion. There are no therapy programs available for Pyromania in prison.

1.4 The defendant had no intention of harming anyone.

1.5 Arson is defined as a violent crime and the defendant's conduct was void of violence. His behavior was not directed at any individual.

1.6 If incarcerated, the defendant would be subject to bodily harm to the extent that his life may be endangered.

1.7 The defendant's remorse is sincere. During his incarceration in the Grant County Jail, his conduct has been exemplary.

II. CONCLUSIONS OF LAW

2.1 In considering the purpose of the Sentencing Reform Act, there are substantial and compelling reasons justifying an exceptional sentence herein.

2.2 Due to the defendant's mental, emotional and psychological condition, the need of society and the public, the Court construes these as factors which will allow the Court to depart from the standard range for the offenses charged.

2.3 That the interests of justice and fairness, and the Sentencing Reform Act are served by imposing an exceptional sentence in this case.

EVAN E. SPERLINE – JUDGE

Presented by: Paul Klasen, Prosecuting Attorney

Approved and notice of presentment waived:
DATED: April 1, 1987

C. E. Hormel, Attorney for Defendant

Karl Alan Shultz
DATED: April 1, 1987

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF GRANT

STATE OF WASHINGTON,	)	
	)	NO. 85-1-00156-0
Plaintiff,	)	
	)	ORDER RE: APPLICATION
v.	)	FOR ADDITIONAL TEN
	)	YEARS TO EXECUTE
KARL ALAN SHULTZ,	)	JUDGMENT
SID# WA 13046106	)	
LIN# QPD 85-09570	)	
	)	
Defendant.	)	

This matter having come before the Court upon the application of the State for an additional ten years to execute judgment and for order to show cause, and the defendant, Karl Alan Shultz, having appeared in person and by his attorney, C. E. Hormel, and having objected to and opposed said motion, and the State having appeared by and through Jerald R. Hamley, Grant County Deputy Prosecuting Attorney, and the Court having read the State's application and letter of September 22, 1997, from the Grant County Clerk, Gordon E. Harris, and having read the Memorandum Opposing Extension of Jurisdiction for Payment of Restitution, and being duly satisfied in the premises, hereby finds as follows:

I. That 1997 Laws of Washington, ch. 121, § 4, is violative of the constitutional provisions of the United States Constitution, Article 1, § 10, and the Constitution of the State of Washington, Article 1, § 23, in that said legislative act is beyond a reasonable doubt ex post facto to the extent that it purports to extend the criminal jurisdiction of the Superior Court and would subject the defendant to any further criminal supervision and punishment for violation of requirements of restitution more than ten years following entry of Judgment and Sentence on April 7, 1987, or release from incarceration on October 7, 1987; and

II. That ch. 121, § 4, does permit extension of the collection of the total restitution remaining at the date hereof with a present balance of $496,987.04 for a period of ten more years to and from ten years following

the date of defendant's release from incarceration on October 7, 1987, as a civil judgment, said civil enforcement of said judgment being limited to the usual civil methods of enforcement of a judgment such as post judgment garnishment, execution and attachment limited by and as permitted by civil statutes and/or rules of court.

NOW, THEREFORE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the criminal jurisdiction of the Superior Court shall cease and terminate on midnight October 7, 1997, and the defendant Karl Alan Shultz, shall no longer be subject to or burdened by the criminal jurisdiction arising from the judgment and sentence of the Superior Court in Grant County cause No. 85-1-00156-0, State of Washington, Plaintiff, v. Karl Alan Shultz, Defendant, entered on April 7, 1987; and

FURTHER, that any enforcement of the restitution judgment in cause No. 85-1-00156-0, State of Washington, Plaintiff, v. Karl Alan Shultz, Defendant, from and after October 7, 1997, be accomplished solely by civil enforcement measures as permitted by the civil judgment statutes and court rules of the State of Washington.

DATED this 13th day of October, 1997.

EVAN E. SPERLINE – JUDGE

Entry of the above order does not constitute any approval or acceptance or waiver of any rights, and all objections and rights of appeal from the above order are hereby reserved by defendant, Karl Alan Shultz:

C. E. HORMEL, WSBA #3187
Attorney for Defendant

JERALD R. HAMLEY, WSBA #10593
Deputy Prosecuting Attorney

THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,	)	
	)	No. 17073-0-111
Appellant,	)	
	)	ORDER CERTIFYING
v.	)	APPEAL
	)	
KARL ALAN SHULTZ,	)	
	)	
Respondent and	)	
Cross-Appellant.	)	

Karl Shultz was ordered to pay $500,000 in restitution after pleading guilty in 1987 to 15 counts of arson. The governing statute, RCW 9.94A.142, was amended in 1994 and 1997 to expand the court's jurisdiction. In 1995, RCW 6.17.020 was amended, giving victims an additional 10 years to collect. In 1997, the State moved for extended jurisdiction. The court granted the victims 10 years extended civil execution on the judgment, but declined to extend criminal jurisdiction on ex post facto grounds. The State appeals the court's declining of jurisdiction under the 1997 amendment. Respondent cross-appeals an earlier extension of jurisdiction under the 1994 amendment.

At issue in this appeal is whether RCW 9.94A.142 as amended is an ex post facto law with respect to appellant.

This appeal is hereby certified to the Supreme Court.

DATED: March 5, 1999

FOR THE COURT:

FRANK L. KURTZ, Acting Chief Judge

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 67776-0
Appellant,	)	
	)	RULING ACCEPTING
v.	)	CERTIFICATION
	)	
KARL ALAN SHULTZ,	)	
	)	
Respondent and	)	
Cross-Appellant.	)	

By order dated March 5, 1999, this matter was certified to this court by Division Three of the Court of Appeals pursuant to RCW 2.06.030. Having reviewed the Court of Appeals file, I agree that the case warrants direct review under the cited statute. Certification is therefore accepted. Court of Appeals Cause No. 17073-0-111, in its entirety, is hereby transferred to this court for determination on the merits.

At the direction of the Chief Justice, the oral argument set for March 23, 1999 in *Personal Restraint Petition of Sappenfield,* No. 67380-2, is stricken. This case and *Sappenfield* will now be set for oral argument as companion cases on May 11, 1999.

Geoffrey Crooks, COMMISSIONER

March 11, 1999

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,	)	
	)	No. 67776-0
Appellant,	)	
	)	En Banc
v.	)	
	)	Filed July 29, 1999
KARL ALAN SHULTZ,	)	
	)	
Respondent	)	

IRELAND, J. – This certified appeal involves 1994 and 1997 amendments to RCW 9.94A.142, a statute authorizing restitution orders pursuant to a criminal conviction. We hold the 1994 and 1997 amendments apply to Shultz's 1987 restitution order, and they do not violate the ex post facto clauses or due process. We reverse the trial court and remand.

FACTS

On April 21, 1986, Karl Alan Shultz pleaded guilty to 16 counts of arson.

Shultz was sentenced on April 7, 1987, and his sentence included a restitution order in the amount of $507,131.62, to be paid out to 20 victims of the arsons. Shultz was released from custody on October 7, 1987. The restitution order contained a specific payment plan, which required Shultz to pay $100 a month, commencing November 1, 1987, to the superior court clerk. The clerk was ordered to disburse the payments on a pro rata basis to the listed victims.

RCW 9.94A.142 authorizes restitution orders for crimes committed after July 1, 1985. The version of RCW 9.94A.142 in effect in 1987 stated the sentencing court's jurisdiction over a restitution order expired ten years after imposition of the sentence. Laws of 1985, ch. 443, § 10. Under this former version of the statute, the court's jurisdiction over Shultz's restitution order would have expired April 7th, 1997. In 1994, however, the Legislature amended RCW 9.94A.142 so as to calculate the 10-year window from the date of sentencing *or the date of release from total confinement.* Laws of 1994, ch. 271, § 601. Assuming this amendment retroactively applies, the court's jurisdiction over Shultz's restitution order was extended from April 7th, 1997, to October 7, 1997.

In the course of this six-month period, the Legislature revisited RCW 9.94A.142 and added a further amendment. Laws of 1997, ch. 121, § 4.[1] This amendment added the following sentence: "Prior to the expiration of the initial ten year period, the superior court may extend jurisdiction under the criminal judgment an additional 10 years for payment of restitution." *Id.* Pursuant to this 1997 amendment, on September 30, 1997, the State filed an application requesting the trial court to extend the court's jurisdiction over Shultz's restitution order for an additional ten years. The trial court considered the request, accepted briefing from Shultz's counsel, heard argument from the parties, and denied the request on constitutional grounds. The court found the 1997 statute did authorize courts to extend jurisdiction, but the court held such extension violated the ex post facto clauses of the state and federal constitutions. On the other hand, the court held that victims entitled to restitution could utilize existing civil law to continue to collect on Shultz's obligation.[2] The State appealed the trial court's ruling, and the Court of Appeals certified the appeal to the Supreme Court.

ANALYSIS

Shultz raises four separate constitutional challenges to the 1994 and 1997 amendments of RCW 9.94A.142. Each challenge will be addressed in turn.

A. Ex Post Facto

The trial judge in this case refused to extend Shultz's restitution order, finding a ten-year extension under the 1997 amendment would violate the ex post facto clause. While the trial court's ruling focused solely on the 1997 amendment, Shultz argues in his cross-appeal that both the 1994 and 1997 amendments should be held unconstitutional. The only difference between the two amendments as applied in this case is the length of time each amendment extended the court's jurisdiction. The 1994 amendment extended jurisdiction six months, while the 1997 amendment would have extended the court's jurisdiction an additional ten years.

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[1] This 1997 amendment became effective July 27, 1997.

This case involves both the 1994 and 1997 amendments: The 1994 amendment extended Shultz's restitution order for six months in 1997, pushing it past the effective date of the 1997 amendment. Absent the effect of the 1994 amendment, the restitution order would have expired before the effective date of the 1997 amendment.

[2] RCW 9.94A.142(6) allows a victim to enforce a restitution order in the same manner as a civil judgment. RCW 6.17.020(3) allows a party holding a civil judgment to petition a court to extend the life of the judgment by an additional 10 years.

A statute is presumed to be constitutional, and the party attacking a statute "has the heavy burden of proving its unconstitutionality beyond a reasonable doubt." *State v. Blank*, 131 Wn.2d 230, 235, 930 P.2d 1213 (1997) (citing *State v. Hennings*, 129 Wn.2d 512, 524, 919 P.2d 580 (1996); *State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994)). The constitutionality of a statute is a question of law which is reviewed de novo. *See State ex ref. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 623, 957 P.2d 691 (1998).

Legislation violates the ex post facto clauses of the state and federal constitutions when it imposes punishment on an act which was not punishable at the time the act was committed, or when it increases the quantum of punishment for the crime after the crime was committed. *Hennings*, 129 Wn.2d at 524-25 (citing U.S. CONST. art. I, § 10; Const § 23; *Ward*, 123 Wn.2d at 496). While prior case law had previously suggested a "disadvantageous" law would violate the ex post facto ; clause, this perspective has been narrowly limited: "'[T]he sole determination of whether a law is "disadvantageous" is whether the law *alters the standard of punishment* which existed under prior law.'" *Hennings*, 129 Wn.2d at 525 (quoting *Ward*, 123 Wn.2d at 498).

Shultz claims the 1994 and 1997 amendments increase his punishment, thereby violating the ex post facto prohibition. This constitutional challenge relies on the assertion that restitution constitutes punishment. Some cases do suggest in dicta that restitution is at least partly punitive. See *State v. Moen*, 129 Wn.2d 535, 539 n.1, 919 P.2d 69 (1996); *In re Personal Restraint of Metcalf*, 92 Wn. App. 165, 179, 963 P.2d 911 (1998), cert. denied, 119 S.Ct. 2405 (1999)). Notwithstanding these suggestions, restitution is statutorily connected to victims' losses:

> [R]estitution . . . shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury.

RCW 9.94A.142(1). *See also State v. McClendon*, 131 Wn.2d 853, 879, 935 P.2d 1334 (1997) (Sanders, J., dissenting) ("Nonpunitive sanctions might include, for example, compensatory damages, *restitution*, and forfeiture of stolen property for return to its rightful owner.") (emphasis added). In fact, restitution payments are paid to the superior court clerk and disbursed directly to the victims, not to the State. Given this direct connection to victims' losses, restitution also contains a strong remedial component.

A resolution of whether restitution is considered penal or remedial is unnecessary in this case. Even if restitution is considered punitive, the 1994 and 1997 amendments have no effect on the *quantum of punishment*. The amendments, as the State attempted to apply them in this case, did not increase *the original amount of restitution* which the sentencing court imposed in 1987. The 1994 amendment extended the court's jurisdiction over Shultz's restitution order for six months, and the 1997 amendment, if the court had not found its application unconstitutional, would have extended the jurisdiction another ten years. These amendments merely extend the length of the sentencing court's jurisdiction to enforce the restitution order, but Shultz's legal *obligation* under the 1987 restitution order was not impacted by the amendments. The amendments, therefore, do not violate the ex post facto clause.

Shultz claims his punishment increases by virtue of the amendments enabling the Department of Corrections (DOC) to collect money owed under his restitution orders for a longer period of time-ultimately resulting in the State, collecting *more* money than if the amendments did not apply. The DOC's being able to collect more of what Shultz legally owes, however, does nothing to *increase punishment*, because collecting *more* of the money *which is already legally owed* is not an increase of punishment. *See Hennings*, 129 Wn.2d at 526 (finding no ex post facto violation with a different amendment to RCW 9.94A.142 because "[t]here is no increase *in the amount of restitution authorized*.") (emphasis added). Shultz has no legal right to pay *less* than he was ordered to pay by the original sentencing court, so his punishment is not increased by extending the length of time the DOC can collect on the restitution order.

Extending the life of a restitution order is analogous to extending the statute of limitation on a criminal act. A person who commits a criminal act is legally answerable to criminal prosecution for a certain period of time. The person has no right to rely upon a fixed limitation period, and the period can be extended without violating the ex post facto clause, so long as the extension occurs before expiration of the original period. *State v. Hodgson*, 108 Wn.2d 662, 669, 740 P.2d 848 (1987). Similarly, Shultz has no right to rely upon a fixed limitation period for the life of a restitution order.

Shultz claims the 1997 amendment authorizes the court to "modify the amount, terms and conditions of restitution," and he claims this unconstitutionally increases his punishment. Br. of Resp./Cross Appellant (hereinafter Br. of Resp't) at 11. Shultz fails to acknowledge that a sentencing court's power to modify the amount, terms and conditions of

restitution existed *before* the 1997 amendment, and neither the 1994 or 1997 amendments affected these specific powers. The mere *extension* of time during which a court has the power to act does not constitute an increase in punishment. Shultz's restitution order has never been *increased* beyond its original sum of $507,131.62, nor did the State request to increase that amount when it petitioned the court in 1997. The 1994 and 1997 amendments do not impact the total amount of restitution Shultz was ordered to pay, so his punishment remains the same.

In a different context, when finding that a term of community placement constituted punishment, this court relied heavily upon the fact that it "imposes significant restrictions on a defendant's constitutional freedoms." *State v. Ross*, 129 Wn.2d 279, 286, 916 P.2d 405 (1996). The effect of the 1997 amendment on Shultz's restitution order does not increase the severity of any restrictions on his constitutional freedoms-the amendment merely allows him a longer period of time to pay off a legal obligation. The mere extension of time for the enforcement of an existing restitution order does not increase punishment. Extending a legal obligation an additional 10 years may disadvantage a defendant, but it does not increase the quantum of the punishment as imposed at the original sentencing. Disadvantageous changes in the law that *do not* increase the quantum of punishment do not violate the ex post facto clause. *Hennings*, 129 Wn.2d at 525-26

Shultz claims a court's power to jail a defendant for up to 60 days for failing to comply with a restitution order constitutes punishment. He claims the 1997 amendment doubles the amount of time he *could* be jailed for "any violation of the *new* conditions." Br. of Resp't at 18 (emphasis added). Shultz is mistaken. No *new* conditions arise because of the 1997 amendment. The 1997 amendment simply maintains the status quo: Shultz was originally ordered to pay $507,131.62 to the victims of his criminal acts, and his legal obligation simply continues under the 1997 amendment, if a court chooses to extend its jurisdiction.

Finding no increase in his punishment when the sentencing court's jurisdiction over Shultz's restitution order is extended, we reverse the trial court, and hold that application of the 1994 and 1997 amendments to Shultz does not violate the ex post facto clause.

B. Due Process

Shultz's due process challenge is equally meritless. A retroactive law violates due process when it deprives an individual of a vested right.

Hennings, 129 Wn.2d at 528 (citing *Caritas Servs. Inc. v. Department of Soc. & Health Servs.*, 123 Wn.2d 391, 413, 869 P.2d 28 (1994)). A vested right is a right that has "become 'a title, legal or equitable, to the present or future enjoyment of property.'" *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 463, 832 P.2d 1303 (1992) (quoting *Miebach v. Colasurdo*, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984)). "'[A] *mere expectation* based upon an anticipated continuance of the existing law'" is insufficient to vest a legal right. *Hennings*, 129 Wn.2d at 528 (quoting *Caritas*, 123 Wn.2d at 414); *see also F.D. Processing*, 119 Wn.2d at 463. Shultz had only a mere expectation that the court's jurisdiction over his restitution order would expire on a particular date. The restitution order is a legally imposed financial obligation, and Shultz has proven no vested right in that legal obligation expiring at any particular time. Shultz fails to establish he had a vested right in the expiration date of the restitution order.

Shultz presents an additional due process argument regarding the 1997 amendment. He claims due process is violated because his original guilty plea in 1986 was not fully knowing and voluntary in light of the 1997 amendment allowing a trial court to double the length of its jurisdiction. In other words, Shultz argues the trial court's new discretionary power to double its jurisdiction over restitution orders is a "direct consequence" of his guilty plea. Since he was not aware of this alleged direct consequence when he entered his plea (because the court's discretionary power to extend jurisdiction did not exist when his plea was entered), Shultz claims his guilty plea is invalid.

A guilty plea is knowing and voluntary if the defendant was informed of the; "direct consequences" of the plea. *State v. Ross* at 284. A direct consequence is one that "represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Id. (internal quotation marks omitted). Sentencing conditions which result from *additional proceedings* do not qualify as "immediate." Id. at 285. An extension of a trial court's jurisdiction over restitution orders is neither immediate nor automatic. The language of the 1997 amendment is discretionary: "[T]he superior court *may* extend jurisdiction ...." Laws of 1997, ch. 121, § 4 (emphasis added). Furthermore, the trial court in this case held additional proceedings to consider the State's request for an extension of jurisdiction. According to the trial court's order, Shultz was given notice of the extension request, appeared through his attorney, and filed a memorandum opposing the extension. The trial court decided it would not extend its jurisdiction on constitutional grounds. Had the court agreed to extend its jurisdiction under the 1997 amendment, such an action would have constituted an *indirect* and tangential consequence of Shultz's

guilty plea, so as to withstand his due process challenge to the 1997 amendment.

The 1994 and 1997 amendments, as applied to Shultz, do not violate due process. Lengthening the court's jurisdiction over his restitution order did not interfere with a vested right, and the extension of the court's jurisdiction is not a direct consequence of his guilty plea.

C. Bills of Attainder

The same constitutional sections prohibiting ex post facto legislation also prohibit bills of attainder. *See* U.S. CONST. art. I, § 10; Const. art. I, § 23. This constitutional protection "prohibit[s] legislatures from singling out disfavored persons and meting out summary punishment for past conduct." *State v. Hennings*, 129 Wn.2d 512, 527, 919 P.2d 580 (1996) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483, 1497, 128 L. Ed. 2d 229 (1994)). A statute violates this constitutional protection if it singles out named individuals or an easily ascertainable group and inflicts punishment without a judicial trial. Id. Legislation does not rise to the level of a bill of attainder if it merely requires a defined group to "'bear burdens which the individual or group dislikes ....'" *State v. Manussier*, 129 Wn.2d 652, 666, 921 P.2d 473 (1996) (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 470, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977)).

The 1994 and 1997 amendments to RCW 9.94A.142 are not bills of attainder because, as discussed above, they do not inflict punishment. The amendments may be burdensome, but do not add to a defendant's punishment as originally imposed by the sentencing court. Restitution was imposed in 1987, and the amendments do not alter the original obligation. *See Hennings*, 129 Wn.2d at 527 (finding an amendment to the restitution statute "does not inflict punishment" because "[r]estitution was already required under the SRA, RCW 9.94A.142.").

D. Double Jeopardy

Because the 1994 and 1997 amendments do not inflict punishment, they also fail to implicate the double jeopardy clauses of the Fifth Amendment and article I, section 9 of our state constitution. Double jeopardy protects a defendant from multiple punishments for the same offense. *Hennings*, 129 Wn.2d at 528. Shultz has never suffered more than one restitution punishment for his string of arsons. The 1994 and 1997 amendments do not impose further punishment for those crimes, so double jeopardy is not implicated.

CONCLUSION

Finding no constitutional infirmity with either the 1994 or 1997 amendments to RCW 9.94A.142 as applied to Shultz, we reverse the trial court's finding of an ex post facto violation, and we remand for further proceedings consistent with this opinion.

Ireland, J.

Guy, C.J. Madsen, J.

Alexander, J.

Smith, J. Talmadge, J.

Johnson, J.

SANDERS, J. (concurring)—I agree in result but reject the self-contradicting claim that a statute may be at once presumed constitutional; unless proved otherwise "beyond a reasonable doubt" while, at the same time, its "constitutionality . . . is a question of law which is reviewed de novo." Majority at 4-5. For the reasons expressed in *Island County v. State*, 135 Wn.2d 141, 155-68, 955 P.2d 377 (1998) (Sanders, J., concurring), I venture the majority got it right the second time.

Sanders, J.

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 67776-0
Appellant,	)	
	)	ORDER DENYING MOTION
v.	)	FOR RECONSIDERATION
	)	
KARL ALAN SHULTZ,	)	
	)	
Respondent.	)	

The Court having considered the Respondent's Motion for Reconsideration:

Now, therefore, it is hereby

ORDERED:

That the Respondent's Motion for Reconsideration is denied.

DATED at Olympia, Washington this 14th day of October, 1999.

Richard P. Guy
CHIEF JUSTICE

U. S. CONSTITUTIONAL PROVISIONS:

Art. 1, § 9.

Limitations upon powers of Congress

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulations of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Art. 1, § 10.

Restrictions upon powers of states

Section 10. No State shall enter into any Treaty, Alliance, or confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Impost or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any

Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. Const. amend. V.

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, § 1.

Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WASHINGTON STATUTORY PROVISIONS AND AMENDMENTS:

RCW 6.17.020.

Execution authorized within ten years – Exceptions – Fee – Recoverable cost

(1) Except as provided in subsections (2) and (3) of this section, the party in whose favor a judgment of a court of record of this state or a district court of this state has been or may be rendered, or the assignee, may have an execution issued for the collection or enforcement of the judgment at any time within ten years from entry of the judgment.

(2) After July 23, 1989, a party who obtains a judgment or order of a court of record of any state, or an administrative order entered as defined in RCW 74.20A.020(6) for accrued child support, may have an execution issued upon that judgment or order at any time within ten years of the eighteenth birthday of the youngest child named in the order for whom support is ordered.

(3) After June 9, 1994, a party in whose favor a judgment has been

rendered pursuant to subsection (1) of this section may, within ninety days before the expiration of the original ten-year period, apply to the court that rendered the judgment for an order granting an additional ten years during which an execution may be issued. The petitioner shall pay to the court a filing fee equal to the filing fee for filing the first or initial paper in a civil action in the court. When application is made to the court to grant an additional ten years, the application shall be accompanied by a current and updated judgment summary as outlined in RCW 4.64.030. The filing fee required under this subsection shall be included in the judgment summary and shall be a recoverable cost.

RCW 9.94A.142 (as stated in 1985):

Restitution – Applicable to offenses after July 1, 1985

(1) When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within sixty days and shall set the terms and conditions under which the defendant shall make restitution. Restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime. For the purposes of this section, the offender shall remain under the court's jurisdiction for a maximum term of ten years subsequent to the imposition of sentence. The portion of the sentence concerning restitution may be modified as to amount, terms and conditions during the ten-year period, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum for the crime. The offender's compliance with the restitution shall be supervised by the department.

(2) Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

(3) In addition to any sentence that may be imposed, a defendant who has been found guilty of an offense involving fraud or other deceptive practice or an organization which has been found guilty of any such offense

may be ordered by the sentencing court to give notice of the conviction to the class of persons or to the sector of the public affected by the conviction or financially interested in the subject matter of the offense by mail, by advertising in designated areas or through designated media, or by other appropriate means.

(4) This section does not limit civil remedies or defenses available to the victim, survivors of the victim, or defendant.

(5) This section shall apply to offenses committed after July 1, 1985.

RCW 9.94A.142 (as stated in 1994):

Restitution – Offenses committed after July 1, 1985

(1) When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (3) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause. The court shall then set a minimum monthly payment that the offender is required to make towards the restitution that is ordered. The court should take into consideration the total amount of the restitution owed, the offender's present past, and future ability to pay, as well as any assets that the offender may have. During the period of supervision, the community corrections officer may examine the offender to determine if there has been a change in circumstances that warrants an amendment of the monthly payment schedule. The community corrections officer may recommend a change to the schedule of payment and shall inform the court of the recommended change and the reasons for the change. The sentencing court may then reset the monthly minimum payments based on the report from the community corrections officer of the change in circumstances. Restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime. For the purposes of this section, the offender shall remain under the court's jurisdiction for a maximum term of ten years following the offender's release from total confinement or ten years subsequent to the entry of the judgment and sentence, whichever period is longer. The portion of the sentence concerning restitution may be modified as to amount, terms and conditions during the ten-year period, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum for the crime. The court may not reduce the total amount of

restitution ordered because the offender may lack the ability to pay the total amount. The offender's compliance with the restitution shall be supervised by the department.

(2) Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

(3) Regardless of the provisions of subsections (1) and (2) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. If the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order.

(4) In addition to any sentence that may be imposed, a defendant who has been found guilty of an offense involving fraud or other deceptive practice or an organization which has been found guilty of any such offense may be ordered by the sentencing court to give notice of the conviction to the class of persons or to the sector of the public affected by the conviction or financially interested in the subject matter of the offense by mail, by advertising in designated areas or through designated media, or by other appropriate means.

(5) This section does not limit civil remedies or defenses available to the victim, survivors of the victim, or defendant. The court shall identify in the judgment and sentence the victim or victims entitled to restitution and what amount is due each victim. The state or victim may enforce the court-ordered restitution in the same manner as a judgment in a civil action. Restitution collected through civil enforcement must be paid through the registry of the court and must be distributed proportionately according to each victim's loss when there is more than one victim.

(6) This section shall apply to offenses committed after July 1, 1985.

RCW 9.94A.142 (as stated in 1997) (also cited as 1997 Wn. Laws, ch. 121, § 4):

Restitution – Offenses committed after July 1, 1985

(1) When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (4) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause. The court shall then set a minimum monthly payment that the offender is required to make towards the restitution that is ordered. The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have. During the period of supervision, the community corrections officer may examine the offender to determine if there has been a change in circumstances that warrants an amendment of the monthly payment schedule. The community corrections officer may recommend a change to the schedule of payment and shall inform the court of the recommended change and the reasons for the change. The sentencing court may then reset the monthly minimum payments based on the report from the community corrections officer of the change in circumstances. Except as provided in subsection (3) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime. For the purposes of this section, the offender shall remain under the court's jurisdiction for a term of ten years following the offender's release from total confinement or ten years subsequent to the entry of the judgment and sentence, whichever period is longer. Prior to the expiration of the initial ten-year period, the superior court may extend jurisdiction under the criminal judgment an additional ten years for payment of restitution. The portion of the sentence concerning restitution may be modified as to amount, terms and conditions during either the initial ten-year period or subsequent ten-year period if the criminal judgment is extended, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum for the crime. The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount. The offender's compliance with the restitution shall be supervised by the department of corrections for ten years following the entry of the judgment and sentence or ten years following the offender's release from

total confinement. If jurisdiction under the criminal judgment is extended, *the department is not responsible for supervision of the offender during the* subsequent period.

(2) Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property or as provided in subsection (3) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

(3) Restitution for the crime of rage of a child in the first, second or third degree, in which the victim becomes pregnant, shall include: (a) All of the victim's medical expenses that are associated with the rape and resulting pregnancy; and (b) child support for any child born as a result of the rape if child support is ordered pursuant to a civil superior court or administrative order for support for that child. The clerk must forward any restitution payments made on behalf of the victim's child to the Washington state child support registry under chapter 26.23 RCW. Identifying information about the victim and child shall not be included in the order. The defendant shall receive a credit against any obligation owing under the administrative or superior court order for support of the victim's child. For the purposes of this subsection, the offender shall remain under the court's jurisdiction until the defendant has satisfied support obligations under the superior court or administrative order but not longer than a maximum term of twenty-five years following the offender's release from total confinement or twenty-five years subsequent to the entry of the judgment and sentence, whichever period is longer. The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount. The department shall supervise the offender's compliance with the restitution ordered under this subsection.

(4) Regardless of the provisions of subsections (1), (2), and (3) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. If the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of the entry of the judgment and sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order.

(5) In addition to any sentence that may be imposed, a defendant who has been found guilty of an offense involving fraud or other deceptive practice or an organization which has been found guilty of any such offense may be ordered by the sentencing court to give notice of the conviction to the class of persons or to the sector of the public affected by the conviction or financially interested in the subject matter of the offense by mail, by advertising in designated areas or through designated media, or by other appropriate means.

(6) This section does not limit civil remedies or defenses available to the victim, survivors of the victim, or defendant including support enforcement remedies for support ordered under Subsection (3) of this section for a child born as a result of a rape of a child victim. The court shall identify in the judgment and sentence the victim or victims entitled to restitution and what amount is due each victim. The state or victim may enforce the court ordered restitution in the same manner as a judgment in a civil action. Restitution collected through civil enforcement must be paid through the registry of the court and must be distributed proportionately according to each victim's loss when there is more than one victim.

(7) This section shall apply to offenses committed after July 1, 1985.

RCW 9.94A.195.

Violation of condition or requirement of sentence—Arrest by community corrections officer – Confinement in county jail

If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court. If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, an offender may be required to submit to a search and seizure of the offender's person, residence, automobile, or other personal property. A community corrections officer may also arrest an offender for any crime committed in his or her presence. The facts and circumstances of the conduct of the offender shall be reported by the community corrections officer, with recommendations, to the court.

If a community corrections officer arrests or causes the arrest of an offender under this section, the offender shall be confined and detained in the county jail of the county in which the offender was taken into custody, and the sheriff of that county shall receive and keep in the county jail, where room is available, all prisoners delivered to the jail by the community corrections officer, and such offenders shall not be released from custody on bail or personal recognizance, except upon approval of the court, pursuant to a written order.

RCW 9.94A.200.

Noncompliance with condition or requirement of sentence – Procedure – Penalty

(1) If an offender violates any condition or requirement of a sentence, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section.

(2) In cases where conditions from a second or later sentence of community supervision begin prior to the term of the second or later sentence, the court shall treat a violation of such conditions as a violation of the sentence of community supervision currently being served.

(3) If an offender fails to comply with any of the requirements or conditions of a sentence the following provisions apply:

(a) (i) Following the violation, if the offender and the department make a stipulated agreement, the department may impose sanctions such as work release, home detention with electronic monitoring, work crew, community service, inpatient treatment, daily reporting, curfew, educational or counseling sessions, supervision enhanced through electronic monitoring, jail time, or other sanctions available in the community.

(ii) Within seventy-two hours of signing the stipulated agreement, the department shall submit a report to the court and the prosecuting attorney outlining the violation or violations, and sanctions imposed. Within fifteen days of receipt of the report, if the court is not satisfied with the sanctions, the court may schedule a hearing and may modify the department's sanctions. If this occurs, the offender may withdraw from the stipulated agreement.

(iii) If the offender fails to comply with the sanction administratively imposed by the department, the court may take action regarding the original noncompliance. Offender failure to comply with the sanction administratively imposed by the department may be considered an additional violation.

(b) In the absence of a stipulated agreement, or where the court is not satisfied with the department's sanctions as provided in (a) of this subsection, the court, upon the motion of the state, or upon its own motion, shall require the offender to show cause why the offender should not be punished for the noncompliance. The court may issue a summons or a warrant of arrest for the offender's appearance;

(c) The state has the burden of showing noncompliance by a preponderance of the evidence. If the court finds that the violation has occurred, it may order the offender to be confined for a period not to exceed sixty days for each violation, and may (i) convert a term of partial confinement to total confinement, (ii) convert community service obligation to total or partial confinement, (iii) convert monetary

obligations, except restitution and the crime victim penalty assessment, to community service hours at the rate of the state minimum wage as established in RCW 49.46.020 for each hour of community service, or (iv) order one or more of the penalties authorized in (a)(i) of this subsection. Any time served in confinement awaiting a hearing on noncompliance shall be credited against any confinement order by the court; and

(d) If the court finds that the violation was not willful, the court may modify its previous order regarding payment of legal financial obligations and regarding community service obligations.

(4) Nothing in this section prohibits the filing of escape charges if appropriate.

PUBLIC HEARING BEFORE HOUSE LAW & JUSTICE
COMMITTEE REGARDING HOUSE BILL 1096
OF JANUARY 29, 1997

Chairman Sheahan: Okay, lets go to, uhh, House Bill 1096. Number one on the agenda. Eide would you like to explain that one?

Eide: When an adult or a juvenile offender is found to have committed an offense the court may impose legal financial obligations such as restitution, crime victim compensation fees, or court cost. In 1995, the Legislature amended the statute of limitations for the enforcement of judgements to allow for the collection of a legal financial obligation for up to 10 years after the date of entry of that judgement, or 10 years after the date when the offender is released from total confinement. In addition, the amendments provided that a party who obtains a judgement may seek an additional 10 year extension on the judgement. There is some question as to whether or not the clerk of the Superior Court is a party within that provision. House Bill 1096 provides that a judgment imposing legal financial obligations including crime victims assessments may be extended by the county clerk for an additional 10 years, solely for the purpose of collecting unpaid court obligations, through a collection agency or a collection services department. The extension of the period to collect these obligations from a felony offender does not extend the Department of Correction responsibility for supervising the offender. In addition, the bill provides that when a juvenile offender turns 18 or when juvenile court jurisdiction concludes, whichever it is later, the Superior Court must docket the balance of the juvenile financial obligations and those obligations remain enforceable for 10 years.

Chairman Sheahan: Representative...Okay, any questions for Eiddi? Okay, Siri Woods and Debbie Wilki would you come forward?

Siri Woods: I want to thank you for allowing me to testify on this bill. This is kind of near and dear to my heart. The handout that your staff will be giving you is a report on my collection

project. We started a collection project three years ago in Chelan County and we've seen, uhm, a real benefit to not only the county, but the state, and to victims. From the process, this is another tool that we are asking for and as your staff report said a couple years ago we tried to add this extension to it. We have always been able to collect for 10 years, well not always, the periods changed over the last 20 years from 6 to 8 to 10 years as the life of any judgement and when we extended the judgement for 10 year on civil cases, uhm, we thought that it was all judgments and, uhm, we had opinions from the attorney general and prosecutors that it didn't cover criminal judgments. So what we're seeking to do now is clarify that it does, uhm, apply to criminal judgments and that, uhh, the clerk may do the extending for the purposes of collecting. Uhm, on that chart that you were handed, uhm, the first column is the difference in the annual return from '93 to '96 and the first column is county revenue and as you can see, we've increased, we increased the annual, uhm, revenue to the county in a collection project by 550,000 dollars a year. The next one is the state. Uhh, the difference in the state, we are bringing 510,000 dollars more to the state every year, uhh, just the collection project. And the last one is the victims and we're bringing over $60,000 dollars a year more to, uhm, victims from our project in Chelan County then we were when just the Department of Corrections was collecting. So having clerks collect and having the ability to use these tools is important for victims as well as the courts themselves and, uhm. I would really encourage you to pass this. And, and I would remind you that this bill, uhh, was, uhh, sponsored last year by the chairman of this committee and it died, uhh, on the Senate Calender last year it finally died. So it had the support, it still does, and I really encourage you to vote for it.

Chairman Sheahan: Okay, can you give your name for the record?

Siri Woods: Yes, oh, I'm sorry. Siri Woods, Chelan County Clerk. And I'm here on behalf of the Washington Association of County Clerks.

Chairman Sheahan: Representative Carol had a question.

Rep. Carol: I, I just, uhh, am kind of curious of, of, uhh, what other things, I mean this impressive of increase of collection. I am just wondering often times there may be some other factors that, uhm, might not be present, other counties that might be using this, that could explain this fairly phenomenal increase in collection. Are there other things that maybe because its project or that maybe other counties or in general our expectation of how, how, uhh, dramatic this is gonna be will not be realized?

Siri Woods: I don't think so. Uhh, it, it, depends on the amount of resources that are dedicated to it. In Chelan County there's one person that I had to beg to get on a, on a, pilot project. Uhm, I asked the commissioners if they'd fund it for six months if I could produce enough revenue to pay for the position and we've continued, as you can see, the increase the revenue to everyone. And I think that the, uhm, the way that collections have been handled in Superior Courts has traditionally been to let the Department of Corrections do it, uhm because our return was not that good and, uhh, because the're enforcing all of the terms of a judgment and sentence. Uhh, I think the emphasis from the court itself and from the clerks office is what makes a difference and I think any kind of activity will generate this kind of results.

Chairman Sheahan: Any other questions? Okay, Debbie did you want, uhh, comment?

Debbie Wilki: My name is Debbie Wilki. I am with the Washington Association of County Of finials. Uhh, along with my duties, I support the Legislation, the County Clerks Association and, uhh, this bill was voted unanimously out of this committee last year as Siri said. In the meanwhile, we did a little additional cleanup that based on recent court cases, uhh, but basically this bill is the product of extensive collaboration with the Prosecuting Attorneys Association, uhh, Department of Corrections, uhh, court personnel, and all involved. And we feel that it's really a good idea to go forward with it now. Probably the most striking example I could give you of, of, why, uhh, the clerk or the Superior Court should have the

ability to extend the collection of criminal legal financial obligations is, uhh, one I gave to someone who questioned me over the telephone, but I can't remember who it was. But, recently there was a juvenile in Lincoln County Superior Court who was sentenced to 34 months incarceration. He was 17 years old. Uhh, the damage that he did when he, uhh, started an arson fire on the courthouse finally the builder tally that came to the tune of 7.5 million dollars. Uhh, I would estimate in his lifetime he would probably never be able to reimburse the various insurance companies that came into play and had to replace that courthouse. But I think that the fact that both juvenile and adult crimes are having, uhh, results of such much more magnitude then we ever conceived of before is a good enough reason to allow that there should be should be some ability to try to compensate not only the victims of those crimes but also the taxpayers in every county who are supporting the courts and the services that are required when crimes are committed. Uhh, thank you.

Chairman Sheahan: Representative Carol?

Rep. Carol: I'm kind of a graph guy, and in looking further at this data, uhm...

Chairman Sheahan: Did you say gra...(inaudible) or graph?

Rep. Carol: Ph on the end (inaudible).

Chairman Sheahan: Go ahead.

Rep. Carol: I see that for return to victims we are talking $60,000 dollars, return to the state $10,000 dollars, and return to the county perhaps $50,000, sort of round numbers. So we are talking $120,000. Sort of knowing what an employee costs we're talking half is eaten up by employee costs, perhaps.

Debbie Wilki: That's right. It's not a money making proposition. The idea of the collections project is not to make money, it's, it should pay for itself at the county level, but it's holding criminals

accountable for what they, uhh, punishment that's imposed by the court and it's to reimburse victims that's the primary purpose of doing it. It's not like it's a great big money maker, but it's the idea that this kind of activity improves the system by holding those people accountable. Uhh, even if it's, uhh, $300.00 dollars and takes us 10 years to collect it. If we get $3.00 dollars a month for that long time, it may cost us more to collect then it is worth, but the impact it has on the victims to show that we are out there trying to make this person pay to the best of there ability, and also the fact that they are held to the order of the court is good for the system.

Chairman Sheahan: Representative Radcliffe had a question?

Rep. Radcliffe: Uhh, thank you Mr. Chairman. Uhh, I support this measure. However, in the Corrections Committee, I think it was in 1995, we've looked at a situation where a minor was incarcerated because of a crime that was perpetrated against his family. So in case of a minor, and, and I don't remember if we passed this bill or not, but the outcome was or the bill proposed that when the parents are the victims that they are not required, they would not be required to, uhh, to pay. Uhh, and I'm wondering if this is going to affect that at all when we are talking about minors here or...?

Debbie Wilki: No. If, if, if it is a legitimate order that's entered by the court the clerk will enforce it. Uhh, but, it's just like the sheriff. If the, if the court orders a bench warrant the sheriff is obligated to enforce it, but, uhm, its like one of the things in our project that we do that was never done before that was to collect, uhm, incarceration fees and attorneys fees from, uhm, juveniles that are incarcerated. And if the parent is, is, the victim in that we don't collect from, make the parents pay to incarcerate the kid when they were the victims of crime. We are trying to make the system work better, and we're trying to encourage courts not to use collections agencies because we don't think that's justice we think that's just collecting money.

Chairman Sheahan: Any other questions? Okay, thank you. Uhh, stay, stay where you are.

Debbie Wilki: Okay.

Chairman Sheahan: We are going to go to 1097.

Debbie Wilki:: Okay.

CERTIFICATION

I, Precilla M. Garcia, Notary Public in and for the County of Grant, State of Washington, residing in Moses Lake, do hereby certify under penalty of perjury of the laws of the State of Washington that:

1. The foregoing Public Hearing Before House Law & Justice Committee Regarding House Bill 1096 of January 29, 1997, was transcribed under my direction, from a certified audio tape from Sharon Hayward, the State of Washington House of Representatives Deputy Chief Clerk, and that such transcription is a true, complete and correct record of said proceedings, to the best of my ability; and

2. I am above the age of 18, a United States citizen, and not a party to this action.

Dated this 31st day of August 1998.

Signed and subscribed before me
Precilla M. Garcia, Notary Public

My Commission Expires: April 20, 2002

Supreme Court, U.S.
FILED
MAR 6 2000
CLERK

(2)

No. 99-1183

IN THE

Supreme Court of the United States

KARL ALAN SHULTZ,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE WASHINGTON SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN D. KNODELL
Grant County Prosecuting Attorney for Respondent
P.O. Box 37
Ephrata, Washington 98823
(509) 754-2011

158284

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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The State of Washington, represented by John D. Knodell III, Prosecuting Attorney in and for Grant County Washington, responds to the *Shultz* Petition for Writ of Certiorari (hereinafter Petition).

STATEMENT OF THE CASE

Respondent takes no exception to Petitioner's Statement of the Case except to note that Petitioner was ordered to pay restitution in the amount of $507,131.62 to some 20 owners of property burned by the arson for which Petitioner was found guilty (Petition App. 7a-9a), that total restitution remaining unpaid on the date the trial court was requested to extend jurisdiction was $496,987.04 (*Id.* at 15a) and the restitution was ordered in the trial court's Judgement and Sentence to commence November 1, 1987 (*Id.* at 10a), not April 7, 1987. (Petition 3)

REASONS FOR DENYING THE WRIT

The fact that the Washington State Supreme Court ". . . cited no federal case law on any of the issues other than the bill of attainder question . . ." (Petition 6) is no valid legal or other reason for granting this Petition. The Washington Supreme Court in its decision considered the provisions of both the Federal and State Constitutions saying "Legislation violates the ex post facto clauses of the state and federal constitutions when it imposes punishment on an act which was not punishable at the time the act was committed, or when it increases the quantum of punishment for the crime after the crime was committed." (Petition App. 21a)

A. Ex Post Facto

Petitioner says

> The extension of the sentencing court's criminal jurisdiction did not result from any violation of the petitioner's conditions of sentence or for failure to meet his court ordered restitution payments under his judgment and sentence. It resulted only by virtue of the later passage of the 1994 and 1997 amendments to RCW 9.94A.142 (App., *infra*, 32A-36A).

(Petition 7) That extension did result from Petitioner's ". . . failure to meet his court ordered payments . . ." Had Petitioner made all of his court ordered payments, this case would not have been taken to the Grant County Washington Superior Court nor to the Washington Supreme Court which granted extension of time for Petitioner's restitution payments. Yes, it resulted also, *but not only*, ". . . by virtue of the later passage of the 1994 and 1997 amendments to RCW 9.94A.142." (*Id.*)

Petitioner also says

> Regardless of the division between the circuits, petitioner submits that under case law of any and all of the circuit courts, the Washington State 1994 and 1997 amendments would ". . . run afoul of the *ex post facto* clause . . ." since "1) the statute must apply retroactively to past conduct; and 2) the statute must work to the prejudice or disadvantage of the defendant . . ."

(*Id.*) This court early held in *Calder v. Bull*, 3 Dall 386, 1 L. Ed. 648 (1748):

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes* the *punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender*. *Id.* at 390, 1 L. Ed. 648 (emphasis in original).

and in *Beazell v. Ohio*, 269 U.S. 167, 70 L. Ed. 216, 46 S. Ct. 68 (1925):

* * *

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto. Id., at 169-170, 70 L Ed 216, 46 S Ct. 68.

Both citations from *Collins v. Youngblood*, 497 US 37, 111 L. Ed. 2d 30, 43, 110 S. Ct. 2715 (1990). To the same effect, *see* Petition App. 21a.

The Washington Supreme Court considered fully each of the means by which a criminal statute is deemed to be an ex post facto law. It discussed whether RCW 9.94A.142 ". . . punishes as a crime an act previously committed, which was innocent when done . . ." at Petition App. 21a-23a. That Court convincingly holds restitution is remedial (*Id.* at 21a), even if deemed punitive it is not ex post facto (*Id.* at 22a), does not increase Petitioner's punishment (*Id.* at 22a-23a) and does not increase the severity of any restrictions of his constitutional freedoms. (*Id.* at 23a)

Petitioner cites *United States v. Johnson*, 181 F.3d 105 (1999) and decisions contrary. (Petition 7) *Johnson* involved a trial court order sentencing Johnson to eighteen months imprisonment plus an new term of twelve months supervised release. Johnson claims the new term of supervised release violates the ex post facto clause. Other Circuit Court opinions to the contrary are cited. (181 F.3d 105). A term of supervised release, resulting in imprisonment if terminated, may result in actual additional incarceration which is clearly punishment. Extension of time to pay restitution to those whose property is damaged or destroyed by Petitioner's arson is, as the Washington Supreme Court clearly demonstrates, not punishment. (Petition App. 21a-23a) Two recent United States Court of Appeals decisions subject to certiorari in this Court agree. In *Jones v. Garner*, 164 F.3d 589 (1999), USCA 11, No. 97-9009, the Court of Appeals held regulations extending the time for reconsideration of parole violated the ex post facto clause saying (164 F.3d at 590):

> The Constitution provides that "[n]o State shall . . . pass any . . . ex post facto Law. . . ." U.S. Const. Art. I, § 10, cl. 1. At the time of the drafting of the Constitution, the phrase " 'ex post facto

> law' was a term of art with a well-established meaning." *Akins v. Snow*, 922 F.2d at 1560. In *Calder v. Bull*, 3 U.S. (Dall.) 386, 1 L. Ed. 648 (1798), the Supreme Court "identified several legislative acts that clearly implicated the core concerns" with respect to ex post facto laws that existed at the time the Constitution was written. *Akins*, 822 F.2d at 1560-61. Included in such legislative acts was any law ". . . that *changes the punishment, and inflicts a greater punishment*, than the law annexed to the crime, when committed." *Akins*, 922 F.2d at 1560-61 (quoting *Calder*, 3 U.S. (Dall.) At 390 (emphasis in original)). The Supreme Court's ex post facto rulings have continued to adhere to the original principle that laws with this effect violate the Constitution's ex post facto prohibition.

In *Carmel v. State of Texas*, 963 S.W.2d 833 (1998), the Court of Appeals held amending a statute providing conviction of a sexual offense on a minor child on the uncorroborated testimony of the victim if *disclosed* within six months, which eliminated the six month trial requirement was not ex post facto, saying (963 S.W.2d at 836):

> That statute as amended does not increase the punishment nor change the elements of the offense that the State must prove. It merely "removes existing restrictions upon the competency of certain classes of persons as witnesses" and is, thus, a rule of procedure. *Hopt v. Utah*, 110 U.S. 574, 590, 4 S. Ct. 202, 210, 28 L.Ed. 262, 269 (1884). Further, there is no showing that the legislature intended that article 38.07 not be a rule

> of procedure and apply as of the date of the offense. *See Generally Lindquist v. State*, 922 S.W.2d 223, 227 n. 4 (Tex-App. — Austin 1996, pet. ref'd.). As a rule of procedure, it applied to pending and future prosecutions.

In *Jones v. Garner*, potential elimination of reduction of incarceration is involved; in *Carmel v. State of Texas*, a rule of procedure, as in the case at bar, is involved.

There is simply no valid justification for holding RCW 9.94A.142 ex post facto.

B. Altering Standard of Punishment

Petitioner says the Washington Legislature intended to inflict punishment by enacting RCW 9.94A.142. In support of this claim he cites testimony to the Washington Legislature of one Debbie Wilki

> . . . a spokesperson . . . for the Washington Association of County Officials, after noting that the 1997 amendment was the result of "extensive collaboration with the Prosecuting Attorney's Association, Department of Corrections and court personnel," testified that the bill's primary purpose is "not to make money" but to hold criminals responsible for the punishment imposed by the Court and to reimburse victims.

(App., *infra*, 41a-43a) Note that this witness said of this statute ". . . it's holding criminals accountable for what they, uhh, punishment that's imposed by the court and *it's to reimburse victims that's the primary purpose of doing it*."

(*Id.* at 41a-42a, emphasis supplied) as the Washington Supreme Court says, "In fact, restitution payments are paid to the superior court clerk and dispersed directly to the victims, not to the State. Given this direct connection to victims' losses, restitution also contains a strong remedial component." (*Id.* at 21a)

Petitioner says ". . . the statutory scheme is also so punitive in purpose and effect 'to create punishment.' " citing *Kansas v. Hendricks* 521 US 456, 138 L. Ed. 2d 501, 117 S. Ct. 2072 (1997). (Petition 8) The Washington Supreme Court demonstrated, citing ample authority, that ". . . extension of time for the enforcement of an existing restitution order does not increase punishment." (Petition App. 23a) See also that entire portion of the Supreme Court opinion from App. pages 21a through 23a.

Petitioner cites *Lynce v. Mathews*, 519 US 433, 137 L. Ed. 2.d 63, 117 S. Ct. 891 (1997) to the assertion that "Retroactively increasing criminal jurisdiction to modify the amount, terms and conditions of restitution, and to enforce by further incarceration denies an offender fair notice of the extent of the penalty for committing arson and leaves governmental power unrestrained." (Petition 8) *Lynce* involved a statute which canceled a prisoner's provisional early release credits. Cancellation of those early release credits eliminated any possibility of early release, thus assuring the prisoner's incarceration for the full period of the criminal sentence. That clearly would add penal punishment that otherwise had been subject to reduction. Extending Petitioner's time for restitution involves *no* criminal punishment, only more time for restitution of damage caused by Petitioner's criminal arson.

Petitioner says the amendments to RCW 9.94A.142 have ". . . the express effect of extending the criminal sentence by an additional ten (10) years during which the petitioner was faced with the possibility or potential of imposition of incarceration for failure to make payments." (Petition 9) Petitioner errs. Those amendments as used in the case before this Court only extend the period for restitution during which Petitioner is faced with potential incarceration for failure to make *restitution* payments.

C. Due Process Question

Petitioner says he had a ". . . reasonable expectation that restitution would last for only ten (10) years, and the summary change of the court's authority to impose restitution prevents Mr. Shultz's plea from being knowing, voluntary, and intelligently made." (Petition 9) The Washington Supreme Court clearly and fully responds to Petitioner's due process argument pointing out that " Shultz had only a mere expectation that the court's jurisdiction over his restitution order would expire on a particular date." (Petition App. 24a, *see also* 24a-25a)

D. Double Jeopardy Question

As the Washington Supreme Court points out

> Because the 1994 and 1997 amendments do not inflict punishment, they also fail to implicate the double jeopardy clauses of the Fifth Amendment and article I, section 9 of our state constitution. Double jeopardy protects a defendant from multiple punishments for the same offense. *Hennings*, 129 Wn.2d at 528. Shultz has never

> suffered more than one restitution punishment for his string of arsons. The 1994 and 1997 amendments do not impose further punishment for those crimes, so double jeopardy is not implicated.

(Petition App. 25a)

Petitioner says ". . . the amendment would increase the punishment of a sentence that was correct when entered . . . The 1997 amendment allows the court to modify not only the amount, but the terms and conditions of restitution." (Petition 10) That is simply not true. The amendment at issue here, as demonstrated above, does *not* increase Petitioner's punishment. Nor does it modify the amount, nor the terms or conditions, of restitution. As demonstrated, it simply and only adds ten years to the time within which Petitioner is required to pay the restitution ordered in the original Judgment and Sentence. (Petition App. 5a-10a)

E. Bill of Attainder Question

Petitioner says "The 1997 amendment inflicts punishment upon Mr. Shultz." (Petition 11) Here again, the Washington Supreme Court clearly and convincingly explains:

> The same constitutional sections prohibiting ex post facto legislation also prohibit bills of attainder. *See* U.S. CONST. § 10; Const. art. I, § 23. This constitutional protection "prohibit[s] legislatures from singling out disfavored persons and meting out summary punishment for past conduct." *State v. Hennings*, 129 Wn.2d 512, 527,

919 P.2d 580 (1996) (citing *Landgraf v. USI film Prods.*, 51 1 U.S. 244, 114 S. Ct. 1483, 1497, 128 L. Ed.2d 229 (1994). A statute violates this constitutional protection if it singles out named individuals or an easily ascertainable group and inflicts punishment without a judicial trial. Id. Legislation does not rise to the level of a bill of attainder if it merely requires a defined group to "bear burdens which the individual or group dislikes..." *State v. Manussier*, 129 Wn.2d 652, 666, 921 P.2d 473 (1996) (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 470, 97 S. Ct. 2777, 53 L. Ed.2d 867 (1977)).

The 1994 and 1997 amendments to RCW 9.94A.142 are not bills of attainder because, as discussed above, they do not inflict punishment. The amendments may be burdensome, but do not add to a defendant's punishment as originally imposed by the sentencing court. Restitution was imposed in 1987, and the amendments do not alter the original obligation. *See Hennings,* 129 Wn. 2d at 527 (finding an amendment to the restitution statute "does not inflict punishment" because "[r]estitution was already required under the SRA, RCW 9.94A.142.").

CONCLUSION

There is no merit in this Petition for Certiorari. It should be denied.

Respectfully submitted,

JOHN D. KNODELL
Grant County Prosecuting Attorney for Respondent
P.O. Box 37
Ephrata, Washington 98823
(509) 754-2011